No. 93-1631

In the Supreme Court of the United States

OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
PETITIONER

v.

COORS BREWING COMPANY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Coors asserts (Resp. Br. 11) that there is "nothing" in the text or history of the Federal Alcohol Administration Act (FAAA), ch. 814, 49 Stat. 977, to show that Congress enacted the labeling restriction in 27 U.S.C. 205(e)(2) to curb strength wars among malt beverage producers. According to Coors, "[t]he *only* basis for the labeling provision that can be gleaned from the legislative history is a concern that alcohol content labels on malt beverages might be misleading." Resp. Br. 15; see also Amicus Br. of Beer Inst. 15 & n.8. That is incorrect. The text and history of the FAAA make clear that the labeling restriction was enacted to prevent malt beverage producers from competing on the basis of high alcohol content.

The text of Section 205(e) shows that Congress's purpose was not limited to preventing malt beverage alcohol content

statements that are misleading. Subsection (e)(1) of Section 205 authorizes the Secretary of the Treasury to promulgate regulations prohibiting "such statements [on labels] * * * as the Secretary * * * finds to be likely to mislead the consumer." 27 U.S.C. 205(e)(1). The prohibition against alcohol content statements on malt beverage labels, however, is not left as a subject for regulation under subsection (e)*(1)*. It is specifically dealt with in a separate provision: subsection (e)*(2)*. Subsection (e)(2), moreover, prohibits *all* alcohol content statements on malt beverage labels, not just those "likely to mislead the consumer."

The legislative history of the FAAA shows that Congress prohibited all malt beverage alcohol statements, regardless of their accuracy, in order to prevent competition among malt beverage producers on the basis of high alcohol strength—*i.e.*, to prevent strength wars. The House committee report on the bill that became the FAAA expressed the judgment that "[m]alt beverages should not be sold on the basis of alcohol content." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 12 (1935). The report explained that the sale of malt beverages on the basis of high alcohol content had resulted in "unfair competition" that had caused "[l]egitimate members of the industry * * * [to] suffer[]." *Ibid.* The report accordingly concluded that "the prohibition of all such statements" was necessary, "*irrespective of their falsity*," to protect "the interest of the consumer and the promotion of fair competition." *Id.* at 12-13 (emphasis added). The prohibition of malt beverage alcohol content statements was accordingly included in Section 205 as one form of "unfair competition" that, as the title of Section 205 indicates, is proscribed by that provision. See FAAA § 5, 49 Stat. 981; see also *Fedway Assocs., Inc.* v. *United States Treasury, Bureau of Alcohol, Tobacco & Firearms*, 976 F.2d 1416, 1420 (D.C. Cir. 1992) (interpreting FAAA provision in light of its title).

As we explain in our opening brief, extensive evidence of the "unfair competition" described in the House report was presented at the hearing on the labeling regulations proposed by the Federal Alcohol Control Administration (FACA) pursuant to the Executive Order that, in the wake of the repeal of Prohibition, had extended the code system governing the alcoholic beverage industry under the National Industrial Recovery Act. See U.S. Br. 7-9. Although Coors criticizes the government's reliance on the FACA hearing on the ground that the FACA regulations "were *replaced* by the FAAA" (Resp. Br. 12), that criticism is unfounded. The House and Senate committee reports stated that, with specified exceptions (none of which included the labeling and advertising restrictions), the bill that became the FAAA "incorporate[d] the greater part of the system * * * enforced by the Government under the codes." H.R. Rep. No. 1542, *supra*, at 4; S. Rep. No. 1215, 74th Cong., 1st Sess. 3 (1935); see also *Hearings on H.R. 8870 Before the Senate Comm. on Finance*, 74th Cong., 1st Sess. 9 (1935) (statement by FACA Chairman that "advertising control" of alcoholic beverage industry was "highly successful" under the code system and that "the same result would follow from this bill.").[1]

In sum, the text and history of the FAAA reflect Congress's determination that beer companies were competing on the basis of high alcohol content, that such competition was "unfair" and adverse to "the interest of the

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[1] Coors also errs in asserting (Resp. Br. 14) that the testimony at the FACA hearing regarding strength wars was limited to "isolated remarks by one witness," Ralph W. Jackman. See U.S. Br. 7-8 (discussing testimony of George McCabe, counsel to Brewers Code Authority, presenting views that were "fairly representative of the general sentiment of the industry"); see also, *e.g.*, *Hearing Before the FACA With Reference to Proposed Regulations Relative to the Labeling of Products of the Brewing Industry* 59 (Nov. 1, 1934) (testimony of Alexander H. Bell about a brewer who found that "in order to meet competition it was necessary to increase the alcoholic content of the beer to some extent").

consumer," and that a prohibition on alcohol content statements in malt beverage labeling and advertising would prevent such unfair competition. Although Congress did not set forth those determinations in separate statutory findings, it was not required to do so. *Turner Broadcasting Sys., Inc.* v. *FCC*, 114 S. Ct. 2445, 2471 (1994) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review."). Moreover, because the congressional determinations underlying the labeling and advertising restrictions on malt beverage alcohol statements concern "legislative," as distinguished from "adjudicative," facts, they are entitled to substantial deference. See, *e.g.*, *Lockhart* v. *McCree*, 476 U.S. 162, 168 n.3 (1986) (citing *Dunagin* v. *City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (plurality opinion of Reavley., J.) (upholding against First Amendment challenge prohibition of most forms of signs advertising alcohol), cert. denied, 467 U.S. 1259 (1984)).

2. In this Court, as in the court of appeals, Coors does not squarely challenge our submission that, at the time of its enactment, the labeling restriction in Section 205(e)(2) (as well as the advertising restriction in Section 205(f)(2)) directly advanced the government's substantial interest in preventing strength wars among beer companies—and therefore satisfied the third part of the *Central Hudson* test. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980); U.S. Br. 25-26. Instead, Coors, like the court of appeals, relies on supposed changes in the malt beverage market since Section 205(e)(2) was enacted. Resp. Br. 17-19. Especially in light of the distinct constitutional foundation that the Twenty-first Amendment continues to furnish for regulation of the sale of alcoholic beverages, the burden properly lies with Coors to show that labeling restrictions that were valid at the time they (and the Twenty-first Amendment) were adopted can no longer

reasonably be regarded as furthering a substantial governmental interest. This Coors has failed to do. In any event, Coors' reliance on asserted changes in the malt beverage market is misplaced.[2]

a. Coors' primary argument is that there is "no evidence" that alcohol content statements in malt beverage labeling and advertising would lead to strength wars, because "the high-strength brews do not have the same popular appeal as the low-strength and the light beers." Resp. Br. 17. That argument is flawed.

The flaw in Coors' argument is most apparent when viewed against Coors' own efforts to dispel the consumer perception that its beer contains less alcohol than other brands. The record shows that Coors distributed wallet cards to show that Coors beer contains as much, if not more, alcohol than competing brands. See U.S. Br. 14. The record also shows that Coors produced Coors Extra Gold, a higher alcohol beer, to increase its share of the market. See *id.* at 36. Finally, Coors sought approval from the Bureau of Alcohol, Tobacco and Firearms (ATF) to put alcohol content statements on its labels and in its advertising, and brought this action when approval was denied, in order to dispel the consumer perception that Coors beer is weak. *Ibid.*; see also Pet. App. 20a. Thus, Coors' own conduct refutes its contention that

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[2] Contrary to the contention of Coors and two of its amici, however, the government is not taking the position in this Court that changes in the malt beverage industry since 1935 are altogether irrelevant to the constitutionality of the labeling restriction. See Resp. Br. 10; Amicus Br. of Beer Inst. 15-17; Amicus Br. of U.S. Tel. Ass'n, *et al.* 4. For example, changes in brewing technology plainly may be relevant to the continued force of the concern expressed in the legislative history of the FAAA that the alcohol content of malt beverages was, at that time, difficult to measure. As we explain in our opening brief, our challenge to the judgment below is based, among other things, on the fact that the Tenth Circuit ignored the historical evidence underlying the labeling restriction and focused exclusively on perceived changes in the industry. U.S. Br. 29.

beer companies would not compete on the basis of high alcohol content if the advertising and labeling restrictions were struck down.[3]

Coors' reliance on the current consumer preference for low-alcohol beers is flawed at a more fundamental level as well. It assumes that the current preference has nothing to do with the advertising and labeling restrictions. Common sense, however, points to a contrary conclusion. As we discuss in our opening brief, it is obvious that the restrictions effectively prevent consumers from selecting beer on the basis of high alcohol content. U.S. Br. 26-27. At the same time, ATF's regulations permit consumers to choose a beer on the basis of its low alcohol content. See *id.* at 6. It is logical to conclude that this state of affairs has encouraged the

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[3] Coors argues that "[t]he net effect of the federal prohibition, with respect to Coors, is that consumers are drinking stronger beers than they think." Resp. Br. 19 n.19. That argument attempts to divert attention from Coors' own conduct, which demonstrates Coors' belief that it will sell more of its beer if it can persuade people that its beer is as strong as other brands. This Court has relied on similar conduct by litigants in finding that a commercial speech restriction satisfies the "directly advances" part of the *Central Hudson* test. See U.S. Br. 36 n.30. Moreover, the evidence in the record shows that other beer companies share Coors' belief that they will suffer in the marketplace if consumers believe that their brand has less alcohol than the competition. See, *e.g.*, Deposition of Lutz E. Issleib 66 (statement of chairman and chief executive of Pabst Brewing Company that "I play follow the leader" with respect to alcohol content of its products); J.A. 127, 267, 352; see also Amicus Br. of Center for Science in the Public Interest 16 (quoting statement by Issleib, upon learning that competitor's brand of "ice" beer was selling because of its high alcohol content: "So I immediately called Milwaukee and said, Add the alcohol! Let's beef it up. They got 5.65 [% alcohol by volume], so mine is 5.7."); see also Suein L. Hwang, *Miller Brewing Gets Heat for New Ice Beer Ads*, Wall St. J., Oct. 12, 1994, at B11 (reporting statement by Anheuser-Busch official that "some brewers appear to be marketing ["ice" beers] on the basis of their allegedly higher strength.").

consumption of low-alcohol beer compared to that of high-alcohol beer.

Furthermore, Coors' reliance on the current consumer preference for low-alcohol beer misapprehends the "directly advances" part of the *Central Hudson* test. Coors erroneously assumes that, under the "directly advances" inquiry, the government must show that, in the absence of the restrictions, *most* people would select beer on the basis of high alcohol content. See Resp. Br. 23-24.[4] It is sufficient, however, that enough people would do so to cause beer companies to compete on the basis of high alcohol content. See *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), discussed in U.S. Br. 32-33 & n.25.

The government made such a showing here. As discussed in the government's opening brief, the evidence shows that Coors and other companies have promoted their beer on the ground that it contains as much or more alcohol than competing brands. U.S. Br. 14. The evidence also shows that competition in the malt liquor segment of the market is intense and has been marked by violations of the labeling and advertising restrictions. *Ibid.*; see also *id.* at 36.[5] Finally, Coors' own expert admitted that, if the restrictions are struck

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[4] To argue otherwise would trap Coors in an obvious contradiction. Coors repeatedly asserts that, in the absence of the restrictions, some people would select a beer based on its *low* alcohol content. See, *e.g.*, Resp. Br. 4, 7, 17-19, 33. Coors thus cannot reasonably dispute that, in the absence of the restrictions, other people would select a beer based on its *high* alcohol content.

[5] Coors errs in suggesting (Resp. Br. 5, 18) that the violations in the malt liquor segment of the market all concerned "descriptive," as opposed to numerical, statements of high alcohol content. See, *e.g.*, J.A. 207-208, 325. Moreover, as explained in our opening brief, the fact that most such violations have involved descriptive statements signifies only that beer companies cannot circumvent the prohibition of numerical alcohol content statements as easily as the prohibition of descriptive alcohol content statements. See U.S. Br. 33; see also J.A. 102.

down, beer companies will probably produce more high-alcohol beers. J.A. 136-149.

b. Coors' challenge is not supported by "[e]mpirical evidence from the many states and countries that permit or require alcohol content labeling on malt beverages." Resp. Br. 20 (italics omitted). As we explain in our opening brief, alcohol content statements are prohibited on malt beverage labels, at least under certain circumstances, in every State and the District of Columbia; no State has an across-the-board rule that permits, much less requires, all malt beverage labels to include alcohol content statements. U.S. Br. 9-11. Thus, the absence of strength wars in the States suggests that the federal labeling restrictions, in tandem with state laws, have been effective.[6]

The evidence concerning other countries, construed most favorably to Coors, is inconclusive. Although Coors argues that only the evidence that favors its position should be accorded significance, it recognizes that there is evidence to

[6] Coors correctly notes (Resp. Br. 31 n.31, 2a, 5a, 10a) that, as a result of recent legislative or regulatory changes, four States listed in our opening brief (U.S. Br. 10 n.7, 11 n.10) as having state-imposed prohibitions against alcohol content statements on malt beverage labels—California, Texas, Maine, and Kentucky—have eliminated those prohibitions. Cal. Code Regs. tit. 4, § 130 (1994); Tex. Alco. Bev. Code Ann. § 101.41 (West 1994); Me. Act of Apr. 20, 1994, ch. 730, § 711, 1994 Me. Legis. Serv. CH. 730 (S.P. 614) (L.D. 1712) (West); Ky. Rev. Stat. Ann. § 244.520 (Michie/Bobbs-Merrill 1994). In addition, one State listed in both Coors' brief and our brief (Resp. Br. 9a; U.S. Br. 10 n.7) as prohibiting such statements, Pennsylvania, has recently repealed that prohibition. Pa. Act No. 80 (Oct. 5, 1994). It appears that the elimination of state restrictions in at least two of those States was prompted in part by the district court's decision in this case striking down the federal labeling restriction. See Statement of Cal. Dep't of Alco. Bev. Contr. (copies lodged with the Clerk of this Court); Ky. Off. of the Att'y Gen., OAG 94-50 (July 18, 1994), 1994 WL 400864 (KY-AG database). In any event, because none of those five States *requires* alcohol content statements on malt beverage labels, such statements are prohibited by the federal labeling restriction.

the contrary. Compare Resp. Br. 20 & nn.21-22 (citing evidence about Canada and the United Kingdom to support its position) with *id.* at 21 n.22 ("no relevant conclusion can be drawn" from the evidence regarding those countries that favors government's position). Indeed, Coors' expert cast doubt on the relevance of all such evidence when he admitted that "beer, more than most categories, is very national." J.A. 172.

c. Coors asserts that ATF "does not believe [the federal labeling restriction] serves the asserted interest." Resp. Br. 21 (italics omitted). ATF has made clear, however, that it believes that the labeling restriction is constitutional. See 58 Fed. Reg. 21,228 (1992). Moreover, although ATF has recommended to Congress that it change the restriction, that recommendation reflects the agency's view that the recommended changes involve policy (not constitutional) issues that are for Congress (not the courts) to resolve.[7]

As we explain in our opening brief, however, Congress has revisited this issue on several occasions and has declined to enact bills that would repeal the labeling restriction in Section 205(e)(2). See U.S. Br. 30 n.23. At the same time, it has enacted legislation requiring health warnings in alcoholic beverage labeling and advertising. *Id.* at 37, 40; see also Amicus Br. of Wine Inst. 8 (citing legislative material as evidence that Congress has "encouraged" a "[r]ethinking [of] the government's policy in this area"). Under those circumstances, ATF's views plainly do not support the conclusion that *Congress* no longer believes that the labeling restriction serves a substantial governmental purpose.

d. Coors argues that the labeling restriction in Section 205(e)(2) is irrational in light of other provisions that require statements of alcohol content on the labels of distilled spirits

[7] One of respondent's amici likewise believes that "the question of alcohol labeling" is one that "Congress should revisit." Amicus Br. of Public Citizen 6 n.1.

and of wine that contains more than 14% alcohol by volume. Resp. Br. 25. That argument is without merit.

This Court rejected a similar argument in *Posadas de Puerto Rico Associates* v. *Tourism Co.*, 478 U.S. 328 (1986). There, a tourism company argued that it was irrational for Puerto Rico to ban casino-gambling advertising directed at residents of Puerto Rico "because other kinds of gambling * * * may be advertised to the residents of Puerto Rico." *Id.* at 342. The Court rejected that argument in light of the history of other kinds of gambling, which, the Court explained, justified the legislature's conclusion that "the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling." *Id.* at 343.

Historical considerations similarly justify Congress's distinctive treatment of alcohol content statements in the labeling and advertising of malt beverages. At the time of the FAAA's enactment, the evidence of unfair competition on the basis of high alcohol content concerned only the malt beverage industry. See U.S. Br. 6-9, 28; see also pp. 2-4, *supra*. That evidence justified Congress's conclusion that the risk of strength wars among malt beverage brewers was more significant than the risk of such wars among producers of other alcoholic beverages. That conclusion continues to be justified by, *inter alia*, evidence that beer is the drink of choice among underage drinkers and young adults, for whom alcohol abuse poses a particularly grave risk. See Amicus Br. of Center for Science in the Public Interest 9-10; Amicus Br. of Council of State Gov'ts, *et al.* 17 n.6.[8]

[8] There is no merit to Coors' other arguments in support of its challenge to the rationality of the labeling restriction. Coors argues (Resp. Br. 26) that the restriction is irrational in light of ATF's failure to prohibit use of the term "malt liquor," which connotes high alcohol content. ATF advises us, however, that it has not adopted such a prohibition because it would be difficult to enforce, given the longstanding and widespread use of the term "malt liquor," and would probably only lead beer companies to devise new terms for high-strength beers. Coors next argues (*id.* at 26-27) that it makes no sense for the labeling restriction to apply unless a State requires the disclosure of alcohol content on malt-beverage labels, while the advertising restriction does not apply unless a State imposes similar restrictions on intrastate beer. For one thing, it is too late for Coors to challenge the government's longstanding view that the labeling restriction applies in States that have not enacted similar restrictions as a matter of state law, see *e.g.*, Rev. Rul. 62-1962-1 C.B. 362; Coors admits that it did not advance such a challenge below. Resp. Br. 2 n.3. Nor is the issue properly before the Court merely because it is addressed in two of the amicus briefs. Amicus Br. of Beer Inst. 9 n.4; Amicus Br. of Ass'n of Nat'l Advertisers, Inc. (ANA) 6-10; see, *e.g.*, *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979). The government's view has never been challenged in any prior case by any beer company or beer advertiser. In any event, it was not irrational for Congress to regulate labeling more stringently than advertising by having the federal labeling restriction apply in the absence of a State law to the contrary. Congress could reasonably determine that alcohol-content comparisons at the point of sale pose a greater threat than alcohol content disclosure in advertising. Although Coors disputes the reasonableness of such a determination by asserting that a beer company could put alcohol content statements on in-store advertising even if it could not put such statements on the labels of the beer itself (Resp. Br. 27), Coors does not suggest that such a practice is occurring, or permitted, anywhere in the country.

3. Coors does not dispute our submission that Congress intended the FAAA's labeling and advertising restrictions to operate in tandem with and facilitate the regulation of alcohol by the States. See U.S. Br. 5-6, 21-22 & n.17. Instead, Coors asserts that the government is barred from making that submission because it was not raised below. Resp. Br. 28. That assertion is incorrect, as the government explained when Coors made the same assertion in opposing the government's petition for a writ of certiorari in this case. See Br. in Opp. 15 n.7; Reply 3 n.1.[9] Coors also contends (Resp. Br. 31)

[9] Coors and one of its amici also criticize the government's "eleventh hour" reliance on *Edge Broadcasting*. Resp. Br. 30; Amicus Br. of Beer Inst. 11. The criticism is unfounded. This Court's decision in *Edge Broadcasting*

that the federal restrictions do not facilitate the enforcement of state laws regulating alcoholic beverages. That contention does not withstand scrutiny.

Coors first argues that, because (in its view) the federal labeling and advertising restrictions do not advance Congress's purpose of preventing strength wars among malt beverage producers, they do not facilitate state laws having a similar purpose. Resp. Br. 28. We have shown above and in our opening brief that the premise of that argument is incorrect. See U.S. Br. 25-33; pp. 4-10, *supra*.

Coors next claims (Resp. Br. 29) to have difficulty understanding our "'border crossing' argument." It is simple. As Coors recognizes (*id.* at 19 n.18, 35 n.37), many States limit the alcohol content of malt beverages sold within the State. See also J.A. 357-360. A resident of such a State must travel to a different State if he or she wants to buy higher-alcohol beer. Before doing so, however, the resident must determine which other State permits the sale of higher-alcohol beer. The federal labeling and advertising restrictions generally prevent the resident from making that determination. They accordingly give effect to the State's judgment regarding the maximum alcohol content appropriate for its citizens.[10]

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was not issued until after the government had filed its opening and reply briefs in the Tenth Circuit and that court had heard oral argument in this case. On the same day that this Court issued its decision in *Edge Broadcasting*, the government advised the Tenth Circuit of that decision in a letter submitted pursuant to Fed. R. App. P. 28(j) and thereafter cited the decision in its rehearing petition (at 11) to the Tenth Circuit in this case.

[10] Coors dwells at some length on the wide variety of state laws regarding the labeling and advertising of malt beverages to show that some States have taken approaches to the disclosure of malt beverage alcohol content that reflect a policy of disclosure in certain circumstances. See Resp. Br. 30-31 & n.31, 34 n.35, 35 n.37. That showing confirms that the federal labeling and advertising restrictions have permitted state experimentation and diversity in this area, and is thus consistent with Congress's intention in enacting the FAAA "to supplement legislation by the States to carry out their own policies." 79 Cong. Rec. 11,714 (1935) (remarks of Rep. Cullen); see also *id.* at 11,723 (remarks of Rep. Celler) (describing variety of state laws on alcoholic beverages); see also U.S. Br. 21 n.17 (citing other portions of debate reflecting intention to enhance ability of States to regulate alcoholic beverages).

Coors also argues (Resp. Br. 29) that the federal restrictions will not prevent citizens of one State from finding out the alcohol content of the beer sold in another State if the latter State has overridden the federal restrictions. That does not mean, however, that the restrictions fail directly to advance Congress's goal of preventing strength wars. Rather, it shows that the restrictions were also designed to accommodate the matrix of state laws that existed both when the FAAA was enacted and now. Coors, like the party challenging the federal restriction on commercial speech in *Edge Broadcasting*, ignores the "congressional policy of balancing the [differing] interests" of the States. 113 S. Ct. at 2704; see also Amicus Br. of Council of State Gov'ts 19.[11]

4. Coors contends (Resp. Br. 31-37) that the federal labeling restriction is not narrowly enough tailored to achieve its purpose. At the outset, Coors argues (*id.* at 31) that, in reviewing the fit between the labeling restriction and the purposes underlying it, the Court should apply a stricter standard than the "reasonable fit" standard required under

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[11] Coors points out (Resp. Br. 30) that whereas the federal ban on lottery advertising at issue in *Edge Broadcasting* applied only in States that themselves banned lotteries, the federal labeling restriction at issue here applies unless a State enacts a law requiring alcohol content statements on malt beverage labels. That difference does not make *Edge Broadcasting* inapposite. It merely reflects that Congress structured the two statutes differently, taking account of the nature of the commercial activity to be regulated. Thus, the FAAA was shaped, as the congressional debate reveals, by Congress's judgment that "[t]he liquor industry is too big and the constitutional and practical limitations on the States are so considerable that they alone cannot do the whole job." 79 Cong. Rec. 11,714 (1935) (remarks of Rep. Cullen).

the fourth part of the *Central Hudson* test. See also Amicus Br. of Public Citizen 12.[12] Coors' argument rests on the erroneous assertion that the labeling restriction is "a categorical prohibition" against the disclosure of the alcohol content of malt beverages. Resp. Br. 31. Elsewhere Coors recognizes that it and other beer companies may disclose the alcohol content of their beer "as long as that information is not on a label or in an advertisement," *id.* at 22, and in States that require such disclosure.[13] Because this case does not involve "the government's power to compel total silence" (*id.* at 9 n.5), Coors' strict scrutiny argument is without merit.[14]

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[12] One of Coors' amici, the Washington Legal Foundation (WLF), similarly argues that the Court has applied strict scrutiny to laws that "suppress[] * * * accurate, factual information on the ground that its dissemination will allegedly impair the achievement of governmental objectives." Amicus Br. of WLF 3; see also *id.* at 4. That argument cannot be reconciled with this Court's application of the *Central Hudson* test, rather than a strict scrutiny standard, in *Posadas* and *Edge Broadcasting*.

[13] Moreover, factual news reporting about the alcohol content of malt beverages is not prohibited under ATF regulations (J.A. 215), contrary to the suggestion of amicus WLF (see Amicus Br. of WLF 13, 15). Nor are "statements on the health benefits of moderate drinking" (Amicus Br. of Wine Inst. 2), unless they are made in connection with advertising and promotion (see *id.* at 6-7).

[14] Coors also argues that strict scrutiny is appropriate because the FAAA was enacted before commercial speech was accorded First Amendment protection. Resp. Br. 32. That argument cannot be reconciled with *Edge Broadcasting*, in which this Court applied the *Central Hudson* test to uphold a federal statute enacted prior to this Court's modern commercial speech jurisprudence. See *Edge Broadcasting*, 113 S. Ct. at 2701 (reviewing lottery statute as amended in January 1975, see Act of Jan. 2, 1975, Pub. L. No. 93-583, § 1, 88 Stat. 1916, prior to *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), which was identified in *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 505 (1981), as the earliest decision of this Court foreshadowing modern commercial speech doctrine); see also *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 759-760 (1976).

Likewise without merit is Coors' argument that Congress could have achieved its goals by limiting the alcohol content of malt beverages instead of restricting alcohol content statements in the labeling and advertising of such beverages. Resp. Br. 35-36. As we explain in our opening brief, Congress reasonably could have concluded that a federal limit on alcohol content would have interfered with the States' authority to regulate alcoholic beverages to a greater extent than do the federal labeling and advertising restrictions. U.S. Br. 24-25. Coors acknowledges as much when it asserts that authority over the labeling of alcoholic beverages does not "implicate the 'core § 2 power' conferred [upon States] by the Twenty-first Amendment." Resp. Br. 44 (quoting *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 713 (1984)).[15] Moreover, contrary to Coors' assertion, labeling restrictions do occupy an important place in the regulation of alcoholic beverages under the Twenty-first Amendment. See *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) (plurality opinion).

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[15] Coors therefore errs when it attempts to distinguish this case from *Posadas* on the ground that "in *Posadas*, it was undisputed that there was no direct regulation of conduct that could have effectively accomplished the government's purposes," because "[p]rohibiting casino gambling altogether would have frustrated the government's pursuit of tourist income." Resp. Br. 36 n.39. So too here, a federal limit on the alcohol content of malt beverages would have frustrated Congress's purpose of facilitating, rather than displacing, state laws regulating alcohol. Coors argues, however, that Congress could have enacted a federal limit on the alcohol content of malt beverages that could be overridden by state laws adopting higher or lower limits. *Id.* at 35. Coors does not explain why its proposal is not subject to the same criticism that Coors elsewhere levels against the federal labeling restriction: *i.e.*, that it "does not respect state authority" because it "affirmatively imposes a federal [restriction] unless the state enacts contrary legislation." *Id.* at 30. In any event, in the absence of labeling and advertising restrictions, Coors' proposal would likely encourage the sort of hazardous behavior addressed by the federal statute upheld in *South Dakota* v. *Dole*, 483 U.S. 203, 208-209 (1987) (interstate travel by young people to buy beer in states with lower legal drinking age).

Congress therefore cannot be faulted for pursuing an approach toward labeling in Section 205(e)(2) that respects State regulatory authority.

Coors also proposes several labeling and advertising restrictions that it claims are more narrowly tailored than the existing federal restrictions. Resp. Br. 36-37. As discussed in our opening brief, however, Congress reasonably could have concluded that those proposals would be less effective. See U.S. Br. 34-37. In particular, restrictions applicable only to malt beverages with the highest alcohol content, such as malt liquor, would not prevent the competition on the basis of high alcohol content that was shown to exist in other segments of the market. A restriction applicable only to descriptive statements of alcohol content, but not numerical statements, would not prevent violations of the sort that have already occurred. See p. 9 n.5, *supra* (violations have included numerical statements). Finally, a restriction applicable to forms of advertising other than labeling ignores that "[e]very labeling is in a sense an advertisement." *Kordel* v. *United States*, 335 U.S. 345, 351 (1948).[16]

There is no support for Coors' claim that the labeling and advertising restrictions prevent people from choosing a beer

[16] Thus, Amicus WLF is misguided in its attempt to draw a sharp "contrast" between "advertising and promotion" and the "straightforward furnishing of an unvarnished fact" on a label. Amicus Br. of WLF 6 n.2; cf. Eben Shapiro, *Molson Ice Ads Raise Hackles of Regulators*, Wall St. J., Feb. 25, 1994, at B1 (describing television advertisements depicting malt beverage label with alcohol content statement). Another Coors' amicus, Public Citizen, proposes, as a more "narrowly tailored" alternative to the federal labeling restriction, a new tax on malt beverages tied to their alcohol content (a proposal to which Coors does not subscribe). See Amicus Br. of Public Citizen 13. The existence of such additional means of preventing strength wars, however, does not demonstrate that the means chosen are invalid. See *Posadas*, 478 U.S. at 344.

based on its low alcohol content. Resp. Br. 33.[17] ATF regulations permit beers having the lowest alcohol content to be labeled as such. 27 C.F.R. 7.26(b)-(d).[18] Moreover, consumers who want to find out the alcohol content of a beer may get that information from its producer. J.A. 214-215, 260.[19]

5. In *Posadas*, this Court distinguished between commercial speech concerning activity that "could have [been] prohibited * * * altogether" and commercial speech concerning activity that "was constitutionally protected and could not have been prohibited." 478 U.S. at 345. The Court indicated that restrictions on the first category should be reviewed under a less stringent standard than restrictions on the second. *Id.* at 345-346. The Court reasoned that "*because* the government could have enacted a wholesale prohibition of

[17] As an initial matter, the assertions by Coors and its amici regarding the "danger[]" that a consumer who wants a low-alcohol beer will unwittingly choose a high-alcohol beer (see Resp. Br. 33-34; Amicus Br. of Public Citizen 6-7) are at odds with Coors' position elsewhere in its submission. Thus, Coors goes to great lengths to dismiss high-alcohol malt beverages as a "fringe product" that are readily identifiable by their "rougher and harsher" taste. Resp. Br. 18-19. Moreover, according to Coors, the alcohol content of "mainstream" malt beverages is kept low because the effect of alcohol upon taste "ensure[s] that any increases in alcohol content would be very slight." *Id.* at 19; see also J.A. 145 (testimony of Coors' expert that "mainstream" beer in U.S. is in "3.5 to 5.5[% alcohol content] bracket").

[18] Although Coors suggests that the regulations may conflict with the FAAA (Resp. Br. 2 n.2), ATF reasonably construes the statute to prohibit only competition on the basis of *high* alcohol content. See 54 Fed. Reg. 3591 (1989).

[19] Amicus WLF asserts that the "regulatory scheme seems well calculated to chill the speech" of producers asked to provide alcohol content information. Amicus Br. of WLF 7. To the contrary, ATF has and exercises the authority to provide guidance in this area. See Amicus Br. of Wine Inst. 7 (discussing ATF proposal to promulgate rules to provide guidance on health claims in advertising and labeling of alcoholic beverages).

the underlying conduct * * * it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand." *Id.* at 346; see also *Meyer* v. *Grant*, 486 U.S. 414, 424 (1988). Coors simply ignores that reasoning in contending that *Posadas* does not support a less stringent standard of review for commercial speech promoting an activity that could be prohibited altogether. Resp. Br. 38-39.[20]

Coors errs in asserting that the application in this case of the less strict standard of review contemplated by *Posadas* would invite "judicial policy judgments about the social value of particular commercial activities." Resp. Br. 40. As this Court has recognized, the sale of alcohol has traditionally been subject to stringent regulation at both the state and federal level. See *Posadas*, 478 U.S. at 346; see also U.S. Br. 40-41 (citing cases). This case thus falls squarely within the reasoning of *Posadas*.[21]

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[20] Nor can the reasoning of *Posadas* concerning the two types of commercial speech be dismissed as "dicta," as amici Beer Institute (at 19) and ANA (at 19) contend.

[21] The standard of review under *Posadas* does not "count[] the government's interest in inhibiting socially harmful activity twice," as amicus Wine Institute claims (at 10). Instead, the *Posadas* standard recognizes that, with respect to commercial speech about certain activities, such as gambling and the sale of alcoholic beverages, the government has a particularly strong regulatory interest, commensurate with the particularly serious social harms those activities have traditionally been understood to cause. That recognition accords with other decisions of this Court that relate the appropriate standard of review to the nature of the speech at issue. Compare, *e.g.*, *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985) (applying strict scrutiny to restrictions on political speech by private persons, because such speech is at the "core" of the First Amendment), with *Board of Trustees* v. *Fox*, 492 U.S. 469, 478 (1989) (less stringent standard of review applies to commercial speech because it occupies a "subordinate position in the scale of First Amendment values").

6. The Constitution itself establishes the strength of legislative policy judgments regarding the sale and use of alcoholic beverages, for the Twenty-first Amendment "confer[s] something more than the normal state authority over public health, welfare, and morals." *California* v. *LaRue*, 409 U.S. 109, 114 (1972). It therefore is appropriate in this case to apply a less stringent standard of review than is normally applied to restrictions on commercial speech, based on *LaRue* and subsequent cases holding that laws within the ambit of the Twenty-first Amendment are entitled to an "added presumption in favor of the[ir] validity" when challenged under the Speech Clause of the First Amendment. *Id.* at 118. Because the federal labeling restriction facilitates the enforcement of such state laws, it is entitled to the added presumption of validity applied in *LaRue*. See U.S. Br. 44-45 & n.35.

Coors ignores the reasoning of *LaRue* by asserting that the regulation challenged there "was valid under the First Amendment, without regard to the Twenty-first Amendment." Resp. Br. 43; see also Amicus Br. of Wine Inst. 11-12.[22] The Court in *LaRue* held that because the regulation was within the ambit of the Twenty-first Amendment, that Amendment "require[d]" (409 U.S. at 119) the application of a less stringent standard of review than would otherwise apply under *United States* v. *O'Brien*, 391 U.S. 367 (1968), to a restriction on expressive activity. The Court in *LaRue* accordingly

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[22] Coors attempts to distinguish *LaRue* on the ground that the regulation at issue in *LaRue* applied only to unprotected "conduct," whereas the legislation at issue here applies to pure "speech." Resp. Br. 43; see also Amicus Br. of WLF 17. That attempt is unavailing. The Court in *LaRue* determined that "at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression." 409 U.S. at 118. By the same token, the Court has recognized that commercial speech is "linked inextricably" with the commercial conduct it concerns. *Edenfield* v. *Fane*, 113 S. Ct. 1792, 1798 (1993) (quoting *Friedman* v. *Rogers*, 440 U.S. 1, 10 n.9 (1979)).

upheld the regulation under a standard that was plainly less stringent than the *O'Brien* test. 409 U.S. at 116 (citing *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487-488 (1955)).

Just as the *O'Brien* test was inappropriate in *LaRue*, the *Central Hudson* test is inappropriate here. See *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987) (*O'Brien* and *Central Hudson* test were "substantially similar" as applied to challenged legislation); see also *Fox*, 492 U.S. at 478. To conclude otherwise would justify the invalidation of federal legislation that is necessary to, and designed to ensure, the effective enforcement of state laws regulating alcohol.

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For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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